

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 10, 2004 Session

LOUIS TYRONE ROBINSON v. RICKY BELL, WARDEN

**Direct Appeal from the Criminal Court for Davidson County
No. 3397 Randall Wyatt, Jr., Judge**

No. M2003-02772-CCA-R3-HC - Filed October 12, 2004

In this procedurally complex appeal, the Petitioner, Louis Tyrone Robinson, appeals the dismissal of his petition for writ of habeas corpus which collaterally attacks several prior convictions. Before the habeas court, and on appeal, the Petitioner contends that the trial court used these prior convictions to enhance his current sentence by finding that he was a persistent offender. The record lacks sufficient proof to show that the trial court based the Petitioner's enhanced sentence on these previous convictions; therefore, we affirm the trial court's dismissal of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and NORMA MCGEE OGLE, J., joined.

Charles E. Walker, Nashville, Tennessee, for the appellant, Louis Tyrone Robinson.

Paul G. Summers, Attorney General and Reporter; Elizabeth T. Ryan, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Michael Rohling, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the habeas court's dismissal of the Petitioner's petition for writ of habeas corpus. As previously stated, this case is procedurally complex. On August 8, 1989, the Petitioner was arrested and charged with Driving Under the Influence of an Intoxicant ("DUI") and Driving on a Revoked License, case number 13960. While out on bond, the Petitioner was charged with two counts of Illegal Sale of Schedule II Controlled Substances, case number 14010. On January 8, 1990, the Petitioner pled guilty in case number 13960 to DUI, a class A misdemeanor, and he pled guilty in case number 14010 to two counts of the Illegal Sale of Schedule II Controlled Substances, a class C felony. The trial court sentenced the Petitioner, as a Range I standard offender,

to eleven months and twenty-nine days for the DUI conviction, and to five years for the two sale of a controlled substance offenses. The trial court ordered the sentences to run concurrently.

The Petitioner was released on parole in case numbers 13960 and 14010 on July 15, 1990. While on parole, on October 1, 1990, the Petitioner was arrested and charged with Assault and Aggravated Assault, in case number 14296. While on bond for these charges, the Petitioner was arrested and charged with Attempted First Degree Murder and two counts of Aggravated Assault, in case number 14358.

On May 28, 1991, the Petitioner entered into a joint plea agreement in cases 14296 and 14358. In case 14296, the Petitioner pled guilty to Simple Assault, a class A misdemeanor, and Attempted Aggravated Assault, a class D felony. The trial court sentenced the Petitioner, as a Range I standard offender, to eleven months and twenty-nine days for Simple Assault, and to two years for the Attempted Aggravated Assault. In case 14358, the Petitioner pled guilty to two counts of Attempted Aggravated Assault, class D felonies, and the trial court sentenced him to two years for each of the Attempted Aggravated Assault convictions. The trial court ordered that all the Petitioner's sentences, on the four convictions in case numbers 14296 and 14358, run concurrently. The Petitioner was released on parole for these convictions on April 3, 1992.

On October 22, 1992, the Petitioner was arrested and charged with First Degree Murder in case number 14977. On April 26, 1993, the Petitioner pled guilty to Second Degree Murder, a class A Felony. The trial court sentenced the Petitioner as a Range III persistent offender to forty years, at forty-five percent.

On May 9, 2003, the Petitioner filed a pro se petition for writ of habeas corpus, and later, through appointed counsel, filed an amended petition for writ of habeas corpus. After a hearing,¹ the trial court dismissed the Petitioner's petition for habeas corpus relief. The habeas court found that the May 28, 1991, sentences were illegal, but denied habeas relief, noting that the illegal sentences had expired and that any issue with the Petitioner's current sentence should be addressed to the convicting court. It is from this order that the Petitioner now appeals.

II. Analysis

Article I, section 15 of the Tennessee Constitution guarantees its citizens the right to seek habeas corpus relief. In Tennessee, a "person imprisoned or restrained of [his or her] liberty, under any pretense whatsoever . . . may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." Tenn. Code Ann. § 29-21-101 (2000). The grounds upon which habeas corpus relief will be granted are very narrow. See State v. Ritchie, 20 S.W.3d 624, 630 (Tenn. 2000). "Unlike the post-conviction petition, the purpose of a habeas corpus petition is to contest void and not merely voidable judgments." Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992). Therefore, in order to state a cognizable claim for habeas corpus relief, the petition must contest a

¹A transcript of the hearing was not submitted to this Court with the record for review.

void judgment. Id. “A void judgment is one in which the judgment is facially invalid because the court did not have the statutory authority to render such judgment. . . . A voidable judgment is one which is facially valid and requires proof beyond the face of the record or judgment to demonstrate its voidableness.” Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998) (citing Archer v. State, 851 S.W.2d 157, 161 (Tenn. 1993)). Thus, a writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant, or that the sentence of imprisonment or other restraint has expired. Archer, 851 S.W.2d at 164; Potts, 833 S.W.2d at 62.

The Petitioner bears the burden of showing by a preponderance of the evidence that the conviction is void or that the prison term has expired. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), *superceded by statute as stated in* State v. Newman, No. 02C01-9707-CC-00266, 1998 WL 104492, at *1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998), *no perm. app. filed*. Because the determination of whether habeas corpus relief should be granted is a question of law, our review is de novo with no presumption of correctness. Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000).

A sentence imposed in direct contravention to a statutory mandate is void. See McLaney v. Bell, 59 S.W.3d 90, 94 (Tenn. 2001); State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978). According to statutory sentencing requirements, where offenses are committed while a defendant is out on bail or parole, the sentences in each case must run consecutively to one another, not concurrently. Tenn. Code Ann. § 40-20-111(b) (2002); Tenn. R. Crim. P. 32 (c)(3)(C).²

The Petitioner argues, essentially, that the sentences in cases 13960, 14010, 14296, and

² Tennessee Code Annotated § 40-20-111(b) provides:

(b) In any case in which a defendant commits a felony while such defendant was released on bail in accordance with the provisions of chapter 11, part 1 of this title, and the defendant is convicted of both such offenses, the trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively, but shall order that such sentences be served cumulatively.

Tennessee Rule of Criminal Procedure 32(c)(3) provides:

Mandatory Consecutive Sentences. Where a defendant is convicted of multiple offenses from one trial or where the defendant has additional sentences not yet fully served as the result of the convictions in the same or other court and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply:

- (A) to a sentence for a felony committed while on parole for a felony;
- (B) to a sentence for escape or for a felony committed while on escape;
- (C) to a sentence for a felony where the defendant was released on bail and the defendant is convicted of both offenses; and
- (D) any other ground provided by law.

14358, were illegal, and that the trial court, therefore, improperly used them to enhance his sentence. Specifically, he contends that, because he was out on bail on offenses 13960 and 14010 when he committed the offenses in cases 14926 and 14358, the trial court was required by statute to order that the sentences run consecutively to each other.³ The Petitioner argues that the trial court enhanced his current sentence, in case number 14977, to Range III at forty-five percent as a result of the prior illegal sentences,⁴ and he is, consequently, currently restrained of his liberty by virtue of those prior sentences. The State counters that, although the sentences might be illegal, the Petitioner is not entitled to the relief sought; the State contends that the Petitioner is not “restrained” on the prior sentences as the Petitioner has already served these sentences and the sentences have fully expired. Furthermore, the State argues that the prior convictions that the Petitioner challenges alone could not have elevated the Petitioner’s classification to a Range III persistent offender.

We need not address whether the judgments that the Petitioner challenges are, in fact, illegal because the record provides insufficient grounds upon which we can grant the Petitioner the relief he seeks. The Petitioner failed to provide a complete and adequate record upon which we could grant him relief. The record does not indicate what factors the trial court considered in determining the Petitioner’s sentence. The judgment for case 14977 evidences only the sentence imposed and the Petitioner’s range classification. Also, we note that the record is insufficient to establish whether the Petitioner agreed to his range classification pursuant to his plea agreement. This information alone is insufficient for this Court to conclude that the judgment in case 14977 is facially invalid.

Furthermore, were we to set aside the judgments for the prior sentences, the Petitioner would still not be entitled to habeas relief. To place the Petitioner in Range III for his Second Degree Murder sentence, the statute requires at least five (5) prior convictions within the same class, a higher class, or within the next two lower classes, or at least two (2) class A or any combination of three (3) class A or class B felony convictions. Tenn. Code Ann. § 40-35-107(a). Because the Petitioner

³ More specifically, the Petitioner’s argument is that his plea of guilty was entered in accordance with a plea bargain, which set forth the sentence he would receive in exchange for his guilty plea; and because the trial court could not, by law, agree to impose his sentences concurrently, the Petitioner could not have entered his plea knowingly and voluntarily. See McLaney v. Bell, 59 S.W.3d 90 (Tenn. 2001).

⁴The Tennessee Sentencing Reform Act of 1989 provides classifications for criminal defendants for the purpose of determining when that defendant could be eligible for parole. A “persistent offender” is defined by the Act as follows:

- (a) A “persistent offender” is a defendant who has received:
 - (1) Any combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes, where applicable; or
 - (2) At least two (2) Class A or any combination of three (3) Class A or Class B felony convictions if the defendant’s conviction offense is a Class A or B felony.

Tenn. Code Ann. § 40-35-107 (a) (2002). The Act further provides that a persistent offender is eligible for release only after serving forty-five percent (45%) of his sentence. Tenn. Code Ann. § 45-35-501 (e) (2002).

is currently incarcerated for a class A felony, he would need five prior convictions of class C or higher, or three prior convictions in class A or B, or 2 prior class A felony convictions for the trial court to sentence the Petitioner as a Persistent Offender. See Tenn. Code Ann. § 40-35-107(a). Of the judgments the Petitioner challenges, the trial court could have used only two—the two class C felony convictions for the sale of cocaine in case 14010—to elevate the Petitioner to a Range III classification. These two class C felony convictions alone were not enough to place the Petitioner in Range III as a persistent offender. However, the record before us does not indicate what other convictions, if any, that the Petitioner may have that the trial court may have considered when it imposed the Range III classification.

As the record does not reflect what factors were used in determining the Petitioner’s release eligibility range (*i.e.*, whether the range enhancement was part of the plea bargain, or whether the two class C felony convictions were part of the basis of the enhancement) we cannot conclude that the Petitioner’s current sentence is enhanced based upon these prior, allegedly illegal, judgments of conviction.

However, even if we were to conclude otherwise, the Petitioner would still not be entitled to habeas corpus relief, as he is not “restrained of liberty” under the prior convictions. In Hickman v. State, the Tennessee Supreme Court recently held:

[A] person is not “restrained of liberty” for purposes of the habeas corpus statute unless the challenged judgment itself imposes a restraint upon the petitioner’s freedom of action or movement. Use of the challenged judgment to enhance the sentence imposed on a separate conviction is not a restraint of liberty sufficient to permit a habeas corpus challenge to the original conviction long after the sentence on the original conviction has expired.

Hickman v. State, No. E2002-01916-SC-R11-PC, 2004 WL _____, ____ S.W.3d ____ (Tenn. Sept. 23, 2004). In Hickman, the Petitioner challenged a sixteen-year-old, fully expired conviction that was used to enhance his sentence in a subsequent federal case. Id. at _____. The petitioner in Hickman argued that his 1986 conviction was a restraint on his liberty by virtue of the collateral consequences of this conviction being on his record. Like the petitioner in Hickman, the Petitioner here argues that he is restrained of his liberty due to the collateral consequences of prior judgments. Similarly, the Petitioner here, like that in Hickman, has already served the sentences, which were fully expired at the time the petition was filed. “[W]hen the restraint on a petitioner’s liberty is merely a collateral consequence of the challenged judgment, habeas corpus is not an appropriate avenue for seeking relief.” Id. at _____. Therefore, this issue is without merit.

III. Conclusion

In accordance with the foregoing authorities and reasoning, we conclude that the Petitioner has failed to present a claim for which habeas corpus relief may be granted. Therefore, we AFFIRM

the trial court's dismissal of the petition for habeas corpus relief.

ROBERT W. WEDEMEYER, JUDGE